Supreme Court, U.S.
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No. 00-1813

In The
SUPREME COURT OF THE UNITED STATES

ZEINAB ALI,
Petitioner,

v.

ALAMO RENT-A-CAR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT ALAMO RENT-A-CAR, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED
(Restated)

Whether this Court should grant certiorari for the purposes of addressing the administration of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, where the district court was required to dismiss Petitioner's claims, and where Petitioner was afforded adequate review at the circuit court level?

PARTIES

Alamo Rent-A-Car, Inc., is a corporation organized under the laws of Delaware and is a wholly owned subsidiary of ANC Rental Corporation. The caption of this case does not list all parties in the proceeding below. The names of all original parties are listed in the Fourth Circuit's caption to its opinion, appearing in Petitioner's Appendix at 1a. *See also Ali v. Alamo Rent-A-Car, Inc.*, 246 F.3d 662 (4th Cir. 2001)(unpublished).

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JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254. The decision under review from the United States Court of Appeals for the Fourth Circuit was rendered on March 6, 2001.

COUNTER-STATEMENT OF THE CASE

The Petition contains various omissions, misstatements and errors concerning the underlying facts and procedural history of this case, which was brought pursuant to The Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, ("Title VII"). In particular, Respondent does not agree that Petitioner's statement of the case (Petition at 2-3) or analysis of the factual basis for the Fourth Circuit's affirmation of the district court's order dismissing this case under Federal Rule of Civil Procedure 12(b)(6) (Petition at 4-5) presents a fair review of the record.[1]

Respondent Alamo Rent-A-Car, Inc., adopts the facts set forth in Petitioner's amended complaint, which, surprisingly, was not appended to the Petition. (See Respondent's Appendix at 1a). Respondent notes that the statement of facts set forth by the Fourth Circuit were based on the "well-pleaded facts in [Petitioner's] complaint" and were

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[1] Respondent objects to Petitioner's efforts to refer this Court to "The Encyclopedia of Islam" as factual predicate for this petition. (Petition at 2, fn. 2). Respondent also objects to Petitioner's efforts to incorporate the contents of a website titled www.islamzine.com into the factual recitation of the record. (Petition at 2, fn. 3). Respondent last objects to Petitioner citing selective portions of the parties' various briefs before the district court and Fourth Circuit as support for the statement of the case, since these assertions were not contained in the Amended Complaint. (Petition at 4, 5).

regarded "in the light most favorable to [Petitioner]." *Ali v. Alamo Rent-A-Car, Inc.*, 246 F.3d 662 (4th Cir. 2001)(unpublished)(Petitioner's Appendix at 3a).

REASONS FOR DENYING THE WRIT

This Court's review on a petition for writ of certiorari is not a matter of right, but of judicial discretion. The writ should be granted only "for compelling reasons." The Petitioner has failed to set forth any compelling reason why this Court should grant the writ, other than Petitioner's dissatisfaction with the result below. Petitioner's argument is at best a disingenuous attempt to recast her facts to and assert a split of authorities in the circuits where none exists. Even if Petitioner's rendition of the facts were accurate, which it is not, there exist insufficient grounds for review. The Petition also fails to address the procedural deficiencies in the appeal, which, when considered, makes the Fourth Circuit's unpublished decision a poor candidate for review.

I. NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION.

The instant Petition purports to raise the question of whether an employer violates the religious accommodation provisions of Title VII by unilaterally imposing an "employment directive" which has the effect of forcing an employee to subordinate her religious beliefs in order to remain employed. (Petition at i). Specifically, Petitioner, who is a devout Muslim, claims that her employer violated her religious beliefs by "directing" and "prohibiting" her from wearing a religiously mandated head covering during the month of Ramadan. Petitioner claims that when she refused to acknowledge this directive, she was transferred to a position

involving less customer contact. Ultimately, Petitioner asserts that she relented to the employment directive out of fear that "she would be dismissed" and that she was later terminated as a result of a reduction in force. (Petition at 3).

Unfortunately, the facts and issue presented here bear little resemblance to the record below. Initially, the Petition conveniently ignores the fact that the district court dismissed Petitioner's amended complaint upon a challenge under Federal Rule of Civil Procedure 12(b)(6), which tests the legal sufficiency of a pleading. *Hishon v. King & Spalding*, 467 U.S. 69 (1984). Yet, the Petition does not reference Federal Rule of Civil Procedure 12(b)(6). Additionally, since the underlying suit was dismissed for failure to state a claim upon which relief could be granted, it might be expected that the Petitioner would append the amended complaint, or at the very least, relevant portions thereof. The Petition does not. The reason? Petitioner does not want the allegations contained in the amended complaint to undercut her new rendition of facts asserted in the Petition.

A review of the amended complaint demonstrates that Petitioner was not subjected to an "employment directive" which required her to subordinate her beliefs in order to remain employed. To the contrary, Petitioner never alleged that she was ordered to remove her head covering or be terminated. According to the allegations of her amended complaint, her supervisor actually told her that she could *continue* adhering to her religious practices, albeit in a position with less customer contact. However, Petitioner failed to allege that the purported transfer would negatively affect the terms and conditions of her employment in any manner. In fact, Petitioner did not even allege that she was transferred to another position, yet alone that she suffered any form of adverse employment action as a result of wearing a full head covering. The only consequence

from the encounter with her supervisor pled by Petitioner was that she decided to wear a smaller head covering, subjectively believing that this would assuage any concerns of her supervisor.[2]

During the hearing on the motion to dismiss before the district court on December 3, 1999, Petitioner conceded that she suffered no adverse employment action. However, although Petitioner appended portions of the hearing transcript to her Petition, this particular segment was conveniently omitted. (Respondent's Appendix at 8a). Petitioner was further forced to concede during argument before the Court of Appeals that she did not suffer any adverse employment action and that her termination was lawful and unrelated to this suit. The Court of Appeals relied on these admissions in rendering its decision. *See Ali v. Alamo Rent-A-Car, Inc.*, 246 F.3d 662, fn. 1-2 (4th Cir. 2001)(unpublished)(Petitioner's Appendix at 3a-4a).

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[2] In her amended complaint, Petitioner suggests that there may have been other employment actions taken against her "...appearing to be in the nature of reprisals." Petitioner, however, did not allege these facts out of concern that she could not satisfy the dictates of Federal Rule of Civil Procedure 11. As noted in the amended complaint: "Discovery filed together with the complaint is intended to establish whether a sufficient basis exists, given Fed.R.Civ.P. 11, for Ms. Ali to allege discrete claims of retaliation in addition to the discrimination claim set forward in this complaint. This allegation and this footnote are intended to give Alamo notice of the plaintiff's potential legal claims in this regard, so it may take such discovery as it sees fit." (Respondent's Appendix at 4a, ¶13, fn. 1). These allegations were effectively withdrawn when Petitioner conceded both at the district court and at oral argument before the Fourth Circuit that she suffered no adverse employment action.

In all, the Petition is a transparent attempt to recast the facts of Petitioner's amended complaint and to avoid the admissions made both before the district court and Court of Appeals. Unfortunately for Petitioner, the issue raised in the Petition is borne out by neither the facts, the record, nor the decision below. The United States Supreme Court is not a forum for a "what if" scenario or for rendering an advisory opinion.

II. NO COMPELLING REASON EXISTS TO EXERCISE DISCRETIONARY REVIEW OF A PROCEDURALLY DEFECTIVE PETITION.

The Petition is procedurally flawed because Petitioner has waived the right to assert the question presented. By way of background, the district court initially dismissed the amended complaint for failure to state a claim upon which relief could be granted largely because of representations made by Petitioner at the December 3, 1999, hearing on the motion to dismiss. In arguments to the district court, Counsel for Petitioner represented that the Petitioner had, in fact, been "threatened" by her supervisor, "received some punishment" but admitted that "...we didn't plead what we considered to be adverse employment actions, because we weren't sure whether she was just subjectively perceiving them as adverse..." (Respondent's Appendix at 7a-9a). Based on these statements, the district court agreed to dismiss the amended complaint without prejudice, and gave Petitioner eleven days to file a second amended complaint to include the allegations made in open court.[3] Counsel for Petitioner gladly accepted the offer,

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[3] To further aid the Petitioner in her efforts to perfect the complaint, the district court further instructed Respondent to provide additional answers to discovery on the issue of her employment

as indicated in the relevant portions of the transcript, notably missing from Petitioner's appendix:

> [Petitioner]: ... We will file the amended complaint, and we will revisit the entire issues set before the court. The frailty that you see in the complaint is in accordance with –
>
> [The Court]: Look, notice pleading is wonderful, but it has to have enough meat on it to survive a motion to dismiss.
>
> [Petitioner]: Judge, I can't answer that without rearguing the issue that you have decided, and I don't wish to do that.
>
> [The Court]: All right.
>
> [Petitioner]: I take your point.
>
> [The Court]: – and I've put you on notice, but I'm telling you that this case better have a bit more to it than what it appears to be to it as I look at is, and, of course, in that

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history and company policies. (Respondent's Appendix at 10a). Respondent complied by providing supplemental discovery answers on December 8, 1999, well within the time given to Petitioner to amend the complaint as ordered by the district court.

> 11-day time period, there's also the opportunity to resolve the matter informally....
>
> [Petitioner]: I'll do that, Judge, and maybe if Ms. Baldrate has a hand in writing the complaint, it will be better than the one I wrote. Thank you.

(Respondent's Appendix at 11a).

Despite the representations made to the district court, Petitioner refused to file a second amended complaint. Instead, Petitioner inexplicably filed a motion to amend judgment under Federal Rule of Civil Procedure 59(e), even though there had never been an "entry of the judgment."[4] This motion, itself being procedurally defective, was denied by the district court on December 7, 1999. Petitioner never filed a second amended complaint within the time frame set forth by the district court. This failure raises a host of procedural flaws, including wavier and estoppel. Petitioner could have easily amended her complaint to plead the required elements to conform with the Fourth Circuit's standards, and attempted to prove her case under the alternative theory advocated in the Petition. In this manner, Petitioner could have preserved her appellate rights on this issue, but chose not to. As such, Petitioner has waived her right to challenge the validity of the *prima facie* requirements followed by every Circuit to consider the issue. The Petition is a very poor candidate for review.

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[4] The Petition wishfully refers to this as a request for reconsideration. (Petition at 5).

III. THE FOURTH CIRCUIT'S RULING IS NOT INCONSISTENT WITH OTHER CIRCUITS OR THE PRIOR DECISIONS OF THIS COURT.

In a transparent attempt to grab this Court's attention, Petitioner argues that the Fourth Circuit's ruling illustrates a significant split between the Circuits and deviation from prior Supreme Court precedent in addressing religious accommodation cases. This contention is meritless.

The entire basis for the Petition is that Petitioner was forced to "forfeit her rights to reasonable accommodation" under the statute. As noted above (Point I, *supra*), this rendition does not comport with the allegations in her own amended complaint. It is undisputed that Petitioner was never ordered to remove her full head covering under threat of losing her job. To the contrary, and by her own admissions, Petitioner was specifically given the opportunity to continue wearing her religious head covering. Viewed in the light most favorable to Petitioner, she could continue adhering to her religious practices, albeit in a position with less customer contact. According to her amended complaint, her supervisor gave her this choice and told her "to think about it" over the weekend. (Respondent's Appendix at 3a, ¶ 9).

Despite being afforded a choice, Petitioner asserts that this was an "employment directive," which had the discriminatory effect of requiring her to subordinate her religious beliefs to her need for employment. (Petition at 8, 9). Petitioner claims that this amounted to actionable "employer-imposed interference with her religious obligations." (Petition at 5). Petitioner's logic is flawed. Factually, given Petitioner's admission that she suffered no "adverse employment action," she is hardly in a position to assert that she was forced to

subordinate her beliefs in order to keep her job. Nor has Petitioner ever alleged that being removed from her existing position would affect the terms and conditions of employment or her career advancement. The district court recognized this, and allowed Petitioner the opportunity to amend her complaint to assert these claims. She refused. Absent some form of discipline or negative consequence, Petitioner could not establish a *prima facie* case necessary to trigger the burden-shifting obligations of accommodation followed by the Circuit Courts. Petitioner's rhetoric and unwarranted sarcasm that "non-accommodation is entirely lawful" in the Fourth Circuit conveniently ignores this point. (Petition at 13).

Petitioner's claim that the Fourth Circuit has somehow decided a novel question of law cannot survive scrutiny. Petitioner's primary complaint is that the *prima facie* framework followed by the Fourth Circuit does not protect an employee who "obeys under protest." (Petition at 8). However, the Fourth Circuit was not faced with this question. Petitioner herein was not subjected to an "either-or" employment directive which would have required her to obey or lose her job. By her own admission, she was given the opportunity to wear her full head covering by working in a different position. Had she alleged that this was a less desirable position which could have negative consequences on the terms and conditions of her employment, then Petitioner may have been faced with a proverbial "Hobson's choice." This, however, was never alleged.

This said, Petitioner makes the remarkable assertion that the decision of the Fourth Circuit is "flatly inconsistent" with this Court's decision in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1976). In *Hardison*, an aggrieved airline employee brought suit against both his employer and his union by claiming that he was discriminated against on the basis of his

religion by being denied a requested schedule accommodation which would have permitted him to avoid working on Saturdays, his avowed Sabbath. Based on the underlying facts and circumstances, the Court ultimately held that TWA had, in fact, made reasonable efforts to accommodate in compliance with 42 U.S.C. 2000e(j), and that the airline was not required to ignore a collectively bargained seniority system as a means of accommodation. Petitioner boldly asserts that "Under *Hardison*, a Title VII violation occurs when an employer refuses to make the required accommodation, regardless of whether the victim defies or succumbs to the unlawful directive." (Petition at 13). The holding of *Hardison*, however, makes no such pronouncement. In fact, the Court was never faced with this issue, since Hardison (unlike Petitioner) held to his religious principles and was discharged for refusing to work his Saturday schedule. *Id.* at 64.

Following *Hardison*, the Court revisited the issue of reasonable accommodation under 42 U.S.C. 2000e(j) in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). In *Philbrook*, a high school teacher brought suit against the school board as a result of a collectively bargained policy prohibiting use of personal business days for religious observance. Unlike Petitioner, Philbrook maintained his religious convictions and took unauthorized leave during holy days of obligation, resulting in a tangible reduction in pay. Although the analysis and holding of *Philbrook* focused on the level and degree of an employer's duty to accommodate, it is notable that this Court declined an invitation to establish a new *prima facie* proof scheme for reasonable accommodation claims. *Id.* at 68. This is most likely due to the fact that the inclusion of the reasonable accommodation language contained in 42 U.S.C. §2000e(j), was not intended to alter the underlying protections of the statute, but rather "was added in 1972 to illuminate the meaning of religious discrimination under the statute." *Id.* at 63,

fn. 1. Instead of delineating a separate proof scheme for religious accommodation cases, the Court recited the framework for a prima facie case of religious discrimination followed by the Court of Appeals for the Second and Fifth Circuits, which requires an employee to show: "(1) he or she had a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement." *Id.* at 65-66 *(quoting Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2nd Cir. 1985); *Turpen v. Missouri-Kansas-Texas R. Co.*, 736 F.2d 1022 (5th Cir. 1984)). That proof scheme is identical to that followed by the Fourth Circuit.

Petitioner's argument that there is somehow a split in the Circuits borders on frivolous. Nearly every Circuit to address the issue of a *prima facie* case of religious accommodation has applied the same elements referenced by this Court's decision in *Philbrook*, *supra*. In fact, the Circuit Courts have been mindful that this Court previously declined an invitation to establish a differing proof scheme for religious accommodation claims. The Third Circuit recently considered this issue in *Shelton v. University of Medicine & Dentistry*, 223 F.3d 220 (3rd Cir. 2000). Relying on the decision in *Philbrook*, *supra*, the Court recognized that this Court specifically declined to "establish for religious accommodation claims a proof scheme analogous to that developed in other Title VII contexts, delineating the plaintiff's prima facie case and shifting production burdens." *Id.* at 225 *(citations omitted)*. The Third Circuit concluded that it would continue to apply a *prima facie* test and burden-shifting approach which was "virtually identical" to that followed by the Second Circuit in *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2nd Cir. 1985). *Id.* at 225.

The reasoning and formulation of the Second and Fifth Circuits (above) has been followed in all of the Circuits which have considered the issue.[5] Further, the *prima facie* framework in all Circuits is predicated on some form of adverse discipline, discharge, penalty, or failure to hire, depending upon the circumstance. *See Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996)(employee must show: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; and (3) he or she was disciplined for failing to comply with the conflicting employment requirement"); *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1340 (8th Cir. 1995)(prima facie showing involves proof that "(1) the employee has a bona fide religious belief that conflicts with an employment requirement; (2) the employee informed the employer of this belief; (3) the employee was disciplined for failing to comply with the conflicting employment requirement"); *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995)(prima facie case of religious discrimination requires: "(1)

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[5] Although the District of Columbia Circuit and First Circuit have not yet definitively considered the issue, the district courts within these Circuits follow the same *prima facie* framework. *See EEOC v. Union Independiente De La Autoridad*, 30 F.Supp.2d 217, 220-221 (D.PR. 1998)(need to establish: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement"); *Rasch v. National Railroad Passenger Corp.*, 1991 WL 221270, *4 (D.D.C. 1991)(plaintiff must establish "(1) that he subscribes to a bona fide religious belief that conflicts with an employment requirement, (2) that he informed the employer of this belief; and (3) that he was disciplined or discharged for failing to comply with the conflicting employment requirement").

that he had a bona fide belief that compliance with an employment requirement would be contrary to his religious belief or practice; (2) that he informed his employer about the conflict; and (3) that he was discharged or penalized for failing to comply with the conflicting employment requirement"); *Wright v. Runyon*, 2 F.3d 214, 216 fn. 4 (7th Cir. 1993)(employee must establish " (1) a bona fide religious practice conflicts with an employment requirement, (2) he brought this practice to his employer's attention, and (3) the religious practice was the basis for his discharge"); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989)(employee must prove: " (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was [not hired] for failure to comply with the conflicting employment requirement"); *Smith v. Pyro Mining Company*, 827 F.2d 1081, 1085 (6th Cir. 1987)(employee must show: " (1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflicts; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement"); *Protos v. Volkswagon of America, Inc.*, 797 F.2d 129, 133 (3rd Cir. 1986)(plaintiff must prove: "(1) that he subscribes to a bona fide religious belief that conflicts with an employment requirement, (2) that he informed the employer of this belief; and (3) that he was disciplined or discharged for failing to comply with the conflicting employment requirement); *Proctor v. Consolidated Freightways Corp.*, 795 F.2d 1472, 1475 (9th Cir. 1986)("to establish a *prima facie* case of religious discrimination under §§2000e(a)(1) and (j), the plaintiff has the burden of pleading and proving that (1) she had a bona fide religious belief; (2) she informed her employer of her religious views and that they were in conflict with her responsibilities as an employee; and (3) she was discharged because of her observance of that belief").

The cases cited by Petitioner as evidence of a split in the Circuits clearly miss the mark. Specifically, Petitioner cites *Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976) and *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998), *cert. denied*, 525 U.S. 1144 (1999) for the proposition that an adverse employment action is not required to bring a reasonable accommodation claim. None of these decisions, however, stand for this proposition for the simple fact that the courts never reached the issue. Petitioner also relies upon a trio of cases from the Ninth Circuit in *Hudson v. Western Airlines, Inc.*, 851 F.2d 261 (9th Cir. 1988), *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); and *American Postal Worker's Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986). Petitioner's reliance on these decisions is misplaced. First, in *American Postal Worker's Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986), the Court of Appeals never considered the issue because the Postal Service had conceded a prima facie case and chose to focus on the question of reasonable accommodation. *Id.* at 775. Next, in both *Hudson v. Western Airlines, Inc.*, 851 F.2d 261 (9th Cir. 1988), and *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), the plaintiffs (unlike Petitioner) had demonstrable adverse employment actions in the form of termination and constructive discharge, respectively. Moreover, as noted above, the Ninth Circuit's formulation of a *prima facie* religious accommodation case essentially mirrors *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996). The only difference between the two formulations is that in the Fourth Circuit, Petitioner was required to plead and prove that "she was *disciplined* for failure to comply with the conflicting employment requirement" (emphasis supplied). *Chalmers*, 101 F.3d at 1019. In the Ninth Circuit, Petitioner would be required to plead and prove that she "was *penalized* in some way because of the conflict" (emphasis supplied). *Townley*, 859 F.2d at 614 n. 5. This is a distinction without a difference, given the admissions made by

Petitioner in the instant case.

Even if Petitioner could show a "semantic" difference between the approach taken in one or more of the Circuits, the redress which Petitioner ultimately seeks is simply not within the purview of Title VII. From a policy standpoint, Petitioner is seeking a result which would represent a sea change in the longstanding remedial goals of Title VII. Petitioner does not seek redress for actual and identifiable harm related to the terms and conditions of her employment, but rather for alleged harm to her faith. This, however, is antithetical to the very purpose of the anti-discrimination statutes. As noted by this Court in *Philbrook*,

> "Title VII's central provisions make it an unlawful employment practice for an employer 'to fail or refuse to hire or to discharge, or otherwise to discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment*... or 'to limit, segregate, or classify his employees ... in any way which would deprive or tend to *deprive any individual of employment opportunities or otherwise adversely affect his status as an employee*...."

Philbrook, 479 U.S. at 63, fn. 1. (emphasis added).

More importantly, the framework for protection of an employee's religious beliefs is predicated on the fact that the employee holds a "sincere" or "bona fide" religious belief. The approach advocated by Petitioner would effectively ignore this requirement and allow an individual who neither stuck to her religious beliefs nor suffered employment consequences of any kind, to nonetheless seek redress. Petitioner seeks to create an entirely new standard which would allow an employee to bring

suit on a theory that the employee was "coerced" into "violating his or her own religious beliefs," without an employment consequence. (Petition at 9).

As additional support for her arguments, Petitioner makes the analogy that sexual harassment law permits an employee who has suffered no economic detriment to nonetheless seek redress under Title VII. Petitioner points to this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and argues that an economic detriment is not a necessary prerequisite to Title VII liability. This is simply not analogous, and is, again, wide of the mark. First, the underlying lesson of *Meritor* was that acts creating a hostile work environment or *quid pro quo* sexual harassment can affect the terms and conditions of one's employment. This point is made clear by this Court's decision just last term in *Clark County School District v. Breeden*, 121 S.Ct. 1508 (2001), where this Court reiterated that actionable sexual harassment requires harm to the terms or conditions of an individual's *employment.* This Court noted:

> "Title VII forbids actions taken on the basis of sex that 'discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.' 42 U.S.C. §2000e-2(a)(1). Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998)(quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91

> L.Ed.2d. 49 (1986)(some internal quotation marks omitted)). See also *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752, 118 S.Ct. 2257, 141 L.Ed.2d. 633 (1998)(Only harassing conduct that is "severe or pervasive" can produce a "constructive alteratio[n] in the terms or conditions of employment"); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment")."

Id. at 1509-1510.

In this case, Petitioner not only fails to allege that the terms and conditions of her employment were affected, but concedes that the terms and conditions were not altered. This is fatal. The laws of sexual harassment do not support Petitioner's arguments and her attempt to cite them are misplaced.

In all, given the facts as pled, the concessions made by Petitioner, and the current state of the law, the Fourth Circuit was justified in analogizing the *prima facie* framework for religion as requiring the establishment of an adverse employment action. This Court should disregard Petitioner's attempt to manufacture a split in the Circuits where none exists, and deny the Petition.

IV. THIS CASE HAS NO FAR-REACHING IMPLICATIONS.

In her summation, Petitioner invokes the specter of our country's Judeo-Christian heritage and argues that the Fourth Circuit's ***unpublished*** decision has "largely nullified" the "protections against discrimination on the basis of religion."

(Petition at 13). Petitioner concludes that the effect of the ruling is to increase the risk of intolerance by supervisors of "European ancestry" against the religious beliefs and practices of Muslims, Buddhists, Siks and countless other denominations. (Petition at 13-14).

Suffice it to say that Petitioner has greatly overstated the significance of both her case and the Fourth Circuit's ruling. Throughout this litigation, Petitioner has admitted that she suffered no detriment or "affect" to the terms and conditions of her employment. Petitioner nonetheless seeks to turn the remedial purpose of Title VII on its head, by asking this Court to permit an individual who claims a subjective harm unrelated to the terms and conditions of her employment to nonetheless sue her employer for employment discrimination. The federal court system is already confronted with the sizeable task of adjudicating innumerable civil rights cases involving actual and identifiable harm. The system would be ill-prepared to additionally handle lawsuits asserting perceived harm unrelated to the terms and conditions of one's employment.

Next, given the many procedural defects which haunt this case, there is little chance that the employment bar will perceive the Fourth Circuit's unpublished ruling as a significant change to existing law governing religious discrimination claims, but rather as an example of faulty pleading practice. This case raises no significant issue of religious discrimination which warrants this Court's review.

CONCLUSION

Because the Petitioner presents a question that was neither raised below nor supported by the factual record, the basis for this Petition is lacking. Because the procedural posture of the underlying claim was compromised by Petitioner's representations to the district court and her subsequent refusal to amend her complaint a second time, this case is a poor candidate for review. For these and all reasons stated herein, Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ZEINAB ALI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. #99-1025-A
	)	
ALAMO RENT-A-CAR, INC.,	)	
	)	
Defendant.	)	

AMENDED COMPLAINT

Preliminary and Jurisdictional Statement

1. This is a lawsuit for religious discrimination in employment, brought by a Muslim woman who was refused permission to wear a religiously-mandated head scarf at work. The case arises under 42 U.S.C. §§1981a and 2000e-2. The court has jurisdiction under 42 U.S.C. §2000e-5(f)(3).

Parties

2. Plaintiff Zeinab Ali is a former employee of Alamo Rent-A-Car, Inc. She is Muslim.

3. Defendant Alamo Rent-A-Car, Inc. ("Alamo") is a corporation in the car rental business.

Claim for Relief

4. In December, 1996, Ms. Ali was working as administrative supervisor of Alamo's National Airport rental facility in Arlington, Virginia, having commenced her employment with the company a half a year earlier.

5. In accordance with her religion's practices and precepts regarding female modesty, Ms. Ali habitually wears a head scarf when in the presence of men. This was the case at all times relevant hereto.

6. While at work at Alamo, Ms. Ali wore a head scarf together with her company uniform. Ms. Ali's wearing of her scarf in no way interfered with her proper discharge of her duties as an Alamo employee or otherwise redounded to the detriment of the company.

7. In early December, 1996, Alamo replaced the former D.C. facilities director who had hired Ms. Ali with one H. Scott Cooper. Thenceforth, Ms. Ali reported to and worked across the hall from Mr. Cooper.

8. Shortly following the arrival of Mr. Cooper, the holy month of Ramadan began. During this month, as in former and subsequent years, Ms. Ali kept her head covered at all times.

9. On or about December 26, 1996, long after his arrival, Mr. Cooper told Ms. Ali that it was best for her not to wear her head scarf at work, as it was not part of her uniform and made her look different from the other company employees. Ms. Ali explained that she had to wear it, particularly since the month of Ramadan was in progress, during which Muslims experienced a heightened awareness of the religious obligations. Mr. Cooper advised Ms. Ali that if she persisted in wearing her head scarf he would place her in a position which she would not come frequently into contact with customers. He told her "to think about it" over the weekend.

10. When, the following Monday, Ms. Ali reported to work wearing her head scarf, Mr. Cooper told her "I see you have made your decision." Fearing the loss of her job, which she needed, Ms. Ali acquiesced reluctantly, after a fashion, in Mr. Cooper's demand. Unable, as a matter of principal, to acquiesce fully in the demand that she uncover her head, she replaced her usual head scarf, mandated for wearing during Ramadan, with a smaller head covering. She wore this covering until leaving her employment with Alamo.

11. Ms. Ali's acquiescence in Mr. Cooper's demand was in derogation of her religious obligations as she understood them. This conflict was at its most severe during the month of Ramadan, during which she was required to manifest more, not less, piety and modesty. The conflict continued for the period of her employment thereafter as well.

12. Mr. Cooper's prohibition, on behalf of Alamo, of Ms. Ali's wearing her head scarf was intentional, willful, in known violation of Ms. Ali's rights, outrageous and motivated by anti-Muslim sentiment or by callous indifference to Ms. Ali's sensibilities as a Muslim.

13. Ms. Ali complained of Mr. Cooper's prohibition to him and to his superiors at Alamo, whereupon she suffered numerous adverse employment actions appearing to be in the nature of reprisals.[1]

14. Ms. Ali filed a timely charge of discrimination with the Arlington County Human Rights Commission and the Equal Employment Opportunity Commission. This lawsuit is being filed within ninety days of her receipt of a right-to-sue letter from the EEOC. Ms. Ali has exhausted her administrative remedies.

15. By the actions of its employee and agent Mr. Cooper set forth above, Alamo discriminated against Ms. Ali by unreasonably refusing to accommodate her religious beliefs, in violation of 42 U.S.C. §2000e.

Wherefore, Ms. Ali requests an order of the court awarding her:

- - a declaration under 28 U.S.C. §2201 that by its actions Alamo violated Ms. Ali's right to employment free from religious discrimination,

---

[1]Discovery filed together with the complaint is intended to establish whether a sufficient basis exists, given Fed.R.Civ.P. 11, for Ms. Ali to allege discrete claims of retaliation in addition to the discrimination claim set forth in this complaint. This allegation and this footnote are intended to give Alamo notice of the plaintiff's potential legal claims in this regard, so that it may take such discovery of same as it sees fit. If discovery reveals no basis for so amending the complaint, Ms. Ali will stipulate to striking this paragraph of her complaint should defendant so request.

- - an award of actual damages and punitive damages against Alamo appropriate to the proof at trial,

- - an award of her costs, including reasonable attorney's fees, and

- - such other relief as is just.

Request for Jury Trial

Ms. Ali requests trial by jury.

Respectfully submitted,

ZEINAB ALI,

By counsel

Dated: October 4, 1999
Counsel for Plaintiff

/s/_____
Victor M. Glasberg, #16184
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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ZEINAB ALI, Plaintiff,	•	C.A. #99-1025-A
v.	•	Alexandria, Virginia December 3, 1999
ALAMO RENT-A-CAR, INC., Defendant.	•	10:00 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

THE COURT: Good morning. All right, we have before us the defendant's motion to dismiss, and I have looked at it with some care. Ms. Baldrate, this is your case, and I want to hear from you a little bit on this. My understanding is that your position is you've basically in your papers, I think, conceded that there was no adverse employment action taken by the defendant against your client. Do I read your papers correctly?

MS. BALDRATE: For purposes of this motion, we would concede that we have yet to receive discovery. We are -

THE COURT: But you know, I mean, rule 11 requires that you have a good foundation for believing that all the elements of your claims are met. It is clearly in the Fourth Circuit an element of this kind of a claim that there be an adverse employment action; don't you agree?

MS. BALDRATE: I'm not so sure. All of the cases cited to you by defendant were summary judgment cases once we were - -

THE COURT: That doesn't make any difference as to the elements. I'm not aware of the Fourth Circuit going - - in fact, the Fourth Circuit has a fairly stringent approach to what is considered an adverse employment action.

MS. BALDRATE: It does, although religion is different in Title VII, different from race and gender in that there is an affirmative duty to accommodate on the part of an employer which does not - - is not true for face and gender and other types of Title VII actions, so this is a somewhat different case for that reason.

The other reason it's different is that she - - instead of taking whatever punishment she would have received, she did receive some punishment, but instead of taking - - she took the hit on the religious side, and our position is that Title VII prohibits discrimination on the basis of religion in employment, and she was discriminated against on the basis of her religion.

THE COURT: Well, what - - my understanding these days, too, and, of course, it didn't grow out of a religion issue,

but that in employment discrimination cases in general, the Supreme Court is now requiring that an employee make a reasonable effort to go up through the grievance procedure or the chain of command so that the employer has an opportunity to address the alleged wrongs.

Now at least as your case is pled - - and I'm not so convinced now that that doesn't need to be pled in order to survive a motion to dismiss.

MS. BALDRATE: I'm sorry, to plead that she actually went up the chain of command?

THE COURT: Or did something. But there is - - do you now, did your client make any complaint to, was it Cooper or whoever this man was, his manager?

MS. BALDRATE: Yes, she did. She complained to a number of people, and she did go up the chain of command and was told that people would get back to her, and nothing ever happened. So it was, you know, over a number of months, she made oral complaints and written complaints. We didn't plead it, but that would come forward once the case moved forward. That would come out.

THE COURT: How many - - because it's such a bare bones complaint, we can't even get a feel for some of these issues, but from the time that he told her not to wear the headdress and then she went back to work, as I understand it, with the smaller head covering, how much longer did she continue to work at Alamo?

MS. BALDRATE: It was a number of months. She went back after he said to think about it over the weekend with

a regular head covering and was, as he threatened, was put in a position where she could not be seen by the customers.

THE COURT: I'm sorry, you said he put her in that position?

MS. BALDRATE: She was transferred to a different location within the facility, where she wouldn't be seen by the customers, and so I'm not sure of the exact day when she decided to change to the smaller head covering in an attempt to get back to her position out front, where she had been working, so it's, caution, we didn't plead what we considered to be adverse employment actions, because we weren't sure whether she was just subjectively perceiving them as adverse or if she would have been sent to this other location at some point anyway.

So we were waiting on discovery for that. We had not resolved our discovery disputes, so - -

THE COURT: I'm not sure - -

MS. BALDRATE: - - we just pled cautiously rather than jumping forward.

THE COURT: Well, I'm not sure how it's done. You're supposed to know - - it's your client. You're supposed to have talked to your client and have a decent idea of what happened before you bring a lawsuit in federal court.

[Transcript at pages 2-5]

* * * * *

THE COURT: All right. Well, what I'm doing is this complaint is not sufficient in my view. It is a legally insufficient complaint. It has not adequately alleged what I believe you have to allege in the Fourth Circuit is that an actual adverse action was taken.

I'm going to dismiss the complaint without prejudice and give you 11 days in which to refile, but I think under rule 11, you have got to conduct -- and I would hope, Ms. Khan, you might -- it's to your client's benefit to talk with counsel, give them what information they need. It sounds to me based on what I've heard this morning is that you do not have sufficient evidence of any genuine adverse employment action.

In the Fourth Circuit, simply changing a person's job assignment, unless it has a negative impact on their career development or changes in the condition of their salary, it has to be a significant, not a minor, change in the terms and conditions of employment, even if it was related to an impermissible motive, in order for it to amount to a cognizable Title VII lawsuit.

So you have leave to refile the complaint within 11 days if you can do so within the strictures of rule 11.

And, Ms. Khan, you will cooperate in giving them [supplemental discovery]- -

MS. KHAN: Yes, Your Honor. I will.

THE COURT: All right, that's fine. Thank you very much.

MS. KHAN: Thank you, your honor.

MR. GLASBERG: Your Honor, may I address the Court for a moment? I don't propose to argue anything.

THE COURT: All right, Mr. Glasberg.

MR. GLASBERG: I may have put Ms. Baldrate at a disadvantage in arguing this case on which I wrote the complaint before she came to my firm. We will file the amended complaint, and we will revisit the entire issues set before the court. The frailty that you see in the complaint is in accordance with –

THE COURT: Look, notice pleading is wonderful, but it has to have enough meat on it to survive a motion to dismiss.

MR. GLASBERG: Judge, I can't answer that without rearguing the issue that you have decided, and I don't wish to do that.

THE COURT: All right.

MR. GLASBERG: I take your point.

THE COURT: – and I've put you on notice, but I'm telling you that this case better have a bit more to it than what it appears to be to it as I look at is, and, of course, in that 11-day time period, there's also the opportunity to resolve the matter informally....

MR. GLASBERG: I'll do that, Judge, and maybe if Ms. Baldrate has a hand in writing the complaint, it will be better than the one I wrote. Thank you.

[Transcript at pages 11-13]